FAR-24957

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 2015-P-0765

COMMONWEALTH

v.

DAVID LYDON

DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the defendant, pursuant to Mass. R.A.P. 27.1, and respectfully requests that he be granted leave to obtain further appellate review of the denial of his Motion for Jail Credit on Suffolk County indictments no. 14-10920.

The grounds for this application are stated in the accompanying memorandum.

Respectfully submitted,
DAVID LYDON
By his attorney,

Jeff Garland (AH)

Jeffrey A. Garland
BBO# 679100
CPCS
One Congress St., Suite # 102
Boston, MA 02114
617-209-5500
jgarland@publiccounsel.net

Date: December 22, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 2015-P-0765

COMMONWEALTH

v.

DAVID LYDON

MEMORANDUM IN SUPPORT OF DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

STATEMENT OF PRIOR PROCEEDINGS

On October 17, 2014, a Suffolk grand jury indicted the defendant, David Lydon, with three offenses arising from his arrest on August 28, 2014, see docket 1484CR10920 (R. 6-8).[1] On February 12, 2015, Mr. Lydon pleaded guilty to all charges and received sentences of two and one half years to three and one half years in State Prison on two charges, concurrent with each other, to be followed by three years of probation on the third charge (R. 4). Mr. Lydon was given credit for 36 days previously served (R. 4).

[1]The record appendix is cited as "(R.)." The Appeals Court's memorandum of decision is cited as "(Memo.)."

On April 2, 2015, Mr. Lydon filed a Motion for Jail Credit, and, on April 8, the Commonwealth filed an opposition (R. 9-17). The Court (Lauriat, J.) denied Mr. Lydon's Motion without hearing on April 23, 2015 (R. 9). Mr. Lydon filed a timely Notice of Appeal on May 21, 2015 (R. 18).

After briefing, the Appeals Court heard oral argument on October 11, 2016. On December 2, 2016, the Appeals Court affirmed the order denying the Motion for Jail Credit in an unpublished memorandum pursuant to Rule 1:28.

On December 22, 2016, the defendant filed a petition for rehearing in the Appeals Court (copy attached).

INTRODUCTION

This case presents an issue that arises often but that no precedent squarely addresses: whether a sentencing judge may, in his or her discretion, give credit for time during which the defendant has been held on a bail mittimus while also serving a sentence on another case. To put it another way: may a judge make a second sentence fully concurrent, *nunc pro tunc*, with another sentence that has already commenced? Or, on the contrary, may "concurrent"

sentences run concurrently only after the last sentence has been imposed? Although the law does not require this credit, Mr. Lydon should have been able to seek it in the judge's discretion.

The sentencing judge ruled, and the Appeals Court affirmed, that he had no authority to grant the credit to make the two sentences fully concurrent - not that he *would not* do it (a ruling that would have been within the judge's discretion), but that he *could not* do it. This rule:

(a) Makes a defendant's total time in prison dependent on scheduling in different courts that is often out of the defendant's control;

(b) Encourages defendants to engage in counterproductive scheduling maneuvering to try to avoid these consequences;

(c) Conflicts with at least the implication of a decision of this Court, Commonwealth v. Ridge, 470 Mass. 1024, 1025 (2015) ("To be sure, had the defendant requested credit for [time already credited to an earlier sentence] at the time of his [second] sentencing, the sentencing judge plainly

would have had the power to accede to or deny the request.");

(d) Conflicts with dicta from the Appeals Court, Commonwealth v. Barton, 74 Mass. App. Ct. 912, 914 (2009) ("'concurrent' sentences may be imposed . . . by the later sentencing judge . . . order[ing] for the later-imposed sentences to begin on the same date as the first, nunc pro tunc"); and

(e) Conflicts with a recent 1:28 decision of a different panel of the Appeals Court, Commonwealth v. Sullivan, No. 16-P-908, 90 Mass. App. Ct. 1114, 2016 Mass. App. Unpub. LEXIS 1064 (Nov. 4, 2016) (Agnes, Blake & Desmond, JJ.) (ordering mittimus to be amended to include credit for time when the defendant was also serving a probation sentence, as sentencing judge had intended).[2]

---

[2] The 1:28 decision in Sullivan is one paragraph; both parties in that case had agreed that the sentencing judge had authority to give credit concurrent with the time when the defendant had been serving the probation sentence, based on the same citations to Barton and Ridge as above, and also agreed that the sentencing judge had intended the defendant to receive that credit. For context, the brief of the Plymouth County District Attorney's Office is attached.

A ruling from this Court is necessary to clear up this conflict on an issue that arises in a substantial fraction of all criminal sentences, for instance when, as in this case, a new arrest triggers both a probation violation sentence and then a sentence for the new crime(s), or when a defendant commits crimes in multiple jurisdictions and the cases proceed at different speeds, causing one sentence to be imposed after the other. Given the frequency with which these scenarios occur, it is surprising that there still is no precedent to guide parties and sentencing judges.

STATEMENT OF FACTS

With a few exceptions, the Appeals Court's decision correctly states the facts. To aid the Court, the defendant offers the following summary:

On August 28, 2014, the police arrested Mr. Lydon for a pair of robberies, one of which involved an assault and battery (R. 6-8, 14). He was arraigned in Dorchester court the next day, and bail was set, which Mr. Lydon never posted (R. 14).

On October 3, 2014, Mr. Lydon was brought to the Roxbury Division of the Boston Municipal Court, where he had been on probation at the time of his arrest. He stipulated based primarily on the Dorchester

robberies and received a sentence amounting to six months in the House of Correction (R. 14).

A Suffolk grand jury indicted Mr. Lydon for two charges of unarmed robbery and one charge of assault and battery on a person sixty years or older, all arising out of his August 28 arrest in Dorchester (R. 6-8). On October 30, he was arraigned in Suffolk Superior Court and bail was set equivalent to that set in Dorchester (R. 3).

On February 12, 2015, Mr. Lydon pleaded guilty to all three charges in Suffolk Superior Court. He was sentenced to two and one-half to three and one-half years' incarceration in State Prison on the two Unarmed Robbery counts, concurrent with each other and imposed forthwith and notwithstanding the Suffolk House of Correction sentence from Roxbury. He also received three years' probation on the third charge, from and after the State Prison sentences (R. 4).

At sentencing on February 12, 2015, Mr. Lydon requested credit dating back to his arrest in Dorchester on August 28, 2014 (R. 15). The judge allowed 36 days' credit from August 28 until the Roxbury sentencing on October 3, but no further, stating that he "can't" give credit for the time from

the imposition of the Roxbury sentence until the sentencing on the present case (R. 23).

On April 2, 2015, Mr. Lydon filed a motion asking the sentencing judge, in his discretion, to allow full credit from the time of his arrest on the robberies, including the additional 132 days when he had had a bail mittimus on the robbery cases but had also been serving a sentence out of Roxbury (R. 9-13). Mr. Lydon did not argue he was entitled to any additional credit as a matter of right, only that, contrary to the judge's statement at sentencing, the judge could grant the credit as a matter of discretion, as reflected by dictum in Commonwealth v. Ridge, 470 Mass. 1024 (2015).

On April 8, 2015, the Commonwealth filed an opposition to the motion, arguing that Ridge did not apply and that Mr. Lydon could therefore not receive any more jail credit (R 16-17).

On April 23, 2015, the sentencing judge denied Mr. Lydon's motion for credit on the papers, writing that "[t]he defendant is not entitled to credit for time being served on sentences in other cases. Comm. v. Ridge, 470 Mass. 1024 (2015), does not apply to the circumstances of the present case" (R. 9).

Mr. Lydon appealed, and on December 2, 2016, the Appeals Court issued a 1:28 memorandum decision affirming the judge's order.

Mr. Lydon disputes only two facts recited by the Appeals Court. First, the decision states that "[t]he defendant filed a motion for jail credit claiming that he was entitled to additional credit (the time that he was serving his sentence pursuant to the violation of probation until the time of the Suffolk sentencing)." (Memo. 3). The defendant has never claimed to be *entitled* to any more credit than he received, only consideration of credit in the court's discretion (R. 9). This may seem a minor semantic quibble - especially since the Appeals Court goes on to note correctly that the claim was framed "as a matter of judicial discretion" - but it is important because the holdings cited by the Appeals Court (Memo. 5-6), apply only to credit to which a defendant is entitled by law or statute, not the availability of discretionary or *nunc pro tunc* credit (though dicta in those same cases does support that credit, as discussed more fully below).

Second, the decision states that, "here, the defendant received the credit that the defendant in

Ridge had requested on appeal, the full thirty-six days that he was held on bail and awaiting sentencing in both Roxbury and Suffolk" (Memo. 5). To the contrary, Mr. Lydon was held only on the Suffolk bail (or more accurately, the Dorchester bail that preceded it) during this time. He was never held on a Roxbury bail, but rather waived his final surrender hearing and was sentenced in Roxbury on his first appearance back in that court - waiving the 30 days he could have taken as a matter of right, Dist./Mun. Cts. R. Prob. Viol. Proc. 3(b)(iii).

ISSUE PRESENTED

Whether a judge may, in his or her discretion, may make one sentence concurrent with a prior sentence, *nunc pro tunc*, by granting credit towards toward the second sentence for time during which the defendant was held on a bail mittimus but was also serving the earlier sentence.

ARGUMENT

THE SENTENCING JUDGE HAD DISCRETION TO CREDIT MR. LYDON FOR THE TIME WHEN HE WAS HELD ON BAIL IN THIS CASE AND ALSO SERVING A SENTENCE ON ANOTHER CASE.

Mr. Lydon seeks only the opportunity to return to ask the sentencing judge to exercise discretion to make this sentence fully concurrent with the Roxbury

sentence, including time from his Roxbury sentencing on October 3, 2014 to his Suffolk Superior sentencing on February 12, 2015, which the judge mistakenly believed he lacked the authority to do.

When a judge mistakenly limits his sentencing discretion, this Court may correct the mistake. See, e.g., Commonwealth v. Williamson, 462 Mass. 676, 684 (2012) ("The judge could not have attempted to exercise discretion that he did not think he had. Therefore the defendant must be resentenced so that the judge may properly exercise his discretion ....").

"Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges." Commonwealth v. Lucret, 58 Mass. App. Ct. 624, 628 (2003). And "'[c]oncurrent' sentences may be imposed in several different ways." Barton, 74 Mass. App. Ct. at 914.

Barton elaborates on different ways that a judge may impose a concurrent sentence in language (emphasized) that applies to this case:

> "[C]oncurrent" sentences may be imposed in several different ways, such as, but not limited to, the following examples: first, when multiple concurrent sentences for several different offenses arising from a single criminal episode

> are ordered on and will begin on the same date; second, when multiple concurrent sentences for several different offenses that arise from several different criminal episodes, perhaps in different counties, but with circumstances being viewed by the later sentencing judge as warranting an order for the later-imposed sentences to begin on the same date as the first, nunc pro tunc; third, when multiple concurrent sentences are ordered on different dates, on account of different offenses that arise from different criminal episodes, whether or not in different counties and, although the later-imposed sentences are ordered to be served concurrently with the first sentence imposed, there is no order by the judge that they are to begin as of the date on which the earlier-imposed sentence commenced, resulting in the possibility that one or more of the later-imposed sentences will extend beyond the completion date of the sentences imposed earlier.

Id. at 914 (emphasis added).

This Court's decision in Ridge also supports a judge's ability to give the credit sought here. Ridge, like this case and like Barton, involved two partially overlapping sentences out of two courts. 470 Mass. at 1025. In 2007, one judge sentenced that defendant to roughly four years in State Prison, with credit covering the time when he had been held in custody on both that case and another case pending in another count. Id. at 1024. In 2008, he was sentenced in the second county to a longer State Prison sentence, concurrent with the first sentence,

but he "neither requested nor received credit for his pretrial detention." Id. Nearly five years later, the defendant did request credit, and a judge denied it. The Supreme Judicial Court held that "the motion judge was not obligated to grant his request" for additional credit, especially considering that Ridge took so long to make the request. Id. at 1025.

Most relevant to this case, however, the Court stated that "[t]o be sure, had the defendant requested credit for his pretrial detention at the time of the [second] sentencing, the sentencing judge plainly would have had the power to accede to or deny the request." Id. This power is what Mr. Lydon asks that the judge be allowed to exercise in this case.

The Appeals Court in this case rejected the application of Ridge to this case because "the court in Ridge used the term 'pretrial detention' in reference to . . . the time that the defendant spent in pretrial custody before both the Norfolk County sentence and the Plymouth County sentence" (Memo. 4). This may be true (though the Ridge opinion is not so precise),[3] but it is a distinction without difference.

---

[3] As noted above, however, it is not true that "the defendant received the credit that the defendant in

The point of Ridge is that the time before trial on both cases is functionally equivalent to the time before trial on one case and after sentencing on the other: at the time of the second sentencing, all the time Ridge was incarcerated before then had already been allocated to the first sentence. As the decision puts it, the first sentence was "wholly inclusive of the period the defendant claims as credit on" his second sentence. 470 Mass. at 1025, quoting Barton, 74 Mass. App. Ct. at 915. The second sentencing judge therefore did not have to give the defendant credit for that time - but he "plainly" could have done so, as Mr. Lydon is seeking here. Id. at 1025.

Barton also rejected the distinction that the Appeals Court tried to draw in this case, between time awaiting trial in two courts and time sentenced in one court while awaiting trial on the other. 74 Mass. App. Ct. at 913. Under Barton, crediting one sentence with the time since arraignment means that that sentence "effectively commence[s]" at arraignment. Id. at 713. If a defendant then receives a second

---

Ridge had requested on appeal" (Memo. 5); the 36 days beginning Mr. Lydon's sentence were mandatory credit because he was not serving any other sentence, even retrospectively.

sentence, all time spent awaiting trial on the second indictment is "in effect, serving the [earlier] sentence," regardless of when the first sentencing occurred. Id. This is time that, under both Ridge and Barton, a judge cannot be forced to make concurrent with the first sentence, but may if he or she chooses. Id. at 914; Ridge, 470 Mass. at 1025.

It would be odd if judges had the power to run two sentences concurrently for the time before sentencing on either (as in the Appeals Court's limited interpretation of Ridge), and for the time after sentencing on both (as for any concurrent sentence), but not for the time in between the first and second sentencing. Judges should continue to be allowed, but not required, to run sentences concurrently or not concurrently as they see fit, so long as the crimes involved do not forbid it.

As far as this case has proceeded - through briefing and decision below, then briefing, argument, and now decision in the Appeals Court - no one has articulated any rationale why there should be a "black hole" between sentencings where credit cannot not be awarded concurrently. It is true that the time for which Mr. Lydon seeks credit has been applied to

another sentence, but this is true of any concurrent sentence, and no reason for rejecting it. The only cases cited against Mr. Lydon have been cases where a court held that a defendant was not *entitled* to the credit as a matter of right, e.g. (Memo. 5-6). But the fact that a defendant cannot force two sentences to be completely concurrent does not deny judges the authority to make them so as a matter of discretion.

Many hypotheticals could demonstrate the odd results that would follow from the rule of the trial court and Appeals Court. A few examples will suffice.

If Mr. Lydon had been sentenced on the new case and the probation case on the same date, in the same court, the judge could have made Mr. Lydon's sentences on the two cases completely concurrent with each other - as completely concurrent as he made the sentences for the two charges of Unarmed Robbery in the new case. The judge should not lose that discretion simply because the two sentencings happened in different courts on different dates.

Inversely, under the rule below, had Mr. Lydon's two robberies happened and been prosecuted in separate counties instead of the same one, their sentences could not have been concurrent in between the time of

the sentencing in one county and the sentencing in the other, even though they were made completely and uncontroversially concurrent in this case.

That scenario is only partially hypothetical: Mr. Lydon actually was sentenced for third robbery in Norfolk County, on April 8, 2015, to the same sentence, concurrent *nunc pro tunc* with credit dating back to the arrest in Suffolk County.[4] Under the holding of the Appeals Court, that common-sense result was improper, because the Norfolk judge could not have given credit for the time between Mr. Lydon's February 12, 2015, sentencing in Suffolk County and his April 8 sentencing in Norfolk, or for the same time at issue in this case, between his October 3, 2014, sentencing in Roxbury and his February 12 sentencing in Suffolk.[5]

Consider also a case identical to the present one except that the defendant pled guilty to the robberies and was sentenced on December 12 instead of February 12. All else being equal, this hypothetical defendant

---

[4] The docket for this third robbery, 1582CR0043, is included with the defendant's brief in the Appeals Court at pp. 28-29.

[5] It is actually even more complicated than that. Mr. Lydon received a one-day stay of his Suffolk sentence, to collect his property before moving from the House of Correction to prison. Would this day be allowed or not allowed to be credited to a separate concurrent sentence under the Appeals Court's rule?

would be eligible for release two months before Mr. Lydon.[6] This disparate result would be unfair to Mr. Lydon because the factors that determined the timing of Mr. Lydon's plea and sentencing - the time from arrest to indictment, the scheduling of arraignment in superior court, the production of discovery, and the scheduling of a lobby conference and plea - were largely if not completely out of his control.

Similarly, consider a defendant in the same circumstances except that, for whatever reason, he was not brought into Roxbury court until December 3 instead of October 3. This defendant would also be eligible for release two months before Mr. Lydon, also for reasons having nothing to do with his conduct.

If defendants cannot reduce this arbitrariness by asking for overlapping credit, defense counsel will reduce it through strategic scheduling. In scenarios like Mr. Lydon's, that will mean delaying the probation surrender as long as possible. But this strategy may not always be possible, and in any event runs counter to the overall policy for resolving

---

[6] There may be cases in which judges may reduce or increase a sentence to account for such differences in credit and to reach an ideal total period of incarceration. That is less likely, however, when the time period is only a matter of months.

probation matters "expeditiously" and criminal prosecutions more deliberately. Commonwealth v. Durling, 407 Mass. 108, 115-16 (1990). Rather than forcing defendants to perform unnecessary (and inefficient) scheduling gymnastics, and to risk arbitrarily longer incarceration if they cannot, a sounder rule is to allow a sentencing judge to grant credit for time awaiting trial even when another sentence has already begun.

CONCLUSION

The trial judge erred in believing he did not have discretion to allow Mr. Lydon's motion for jail credit.

For the reasons stated herein, and to establish a clear precedent that resolves the conflict between the Appeals Court's decision in this case and other statements and decisions in other cases, this Court should grant the defendant's application for further appellate review.

Respectfully submitted,

DAVID LYDON
By his attorney,

(AH)

Jeffrey A. Garland
BBO# 679100
CPCS
One Congress St., Suite # 102
Boston, MA 02114
617-209-5500
jgarland@publiccounsel.net

Date: December 22, 2016

ADDENDUM

APPEALS COURT'S MEMORANDUM OF DECISION

DEFENDANT'S PETITION FOR REHEARING

DEFENDANT'S MOTION FOR JAIL CREDIT, WITH SENTENCING JUDGE'S MARGINAL ORDER DENYING IT

MEMORANDUM OF DECISION FROM COMMONWEALTH V. SULLIVAN, NO. 16-P-908 (NOV. 4, 2016).

BRIEF OF PLYMOUTH COUNTY DISTRICT ATTORNEY'S OFFICE, COMMONWEALTH V. SULLIVAN

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-765

COMMONWEALTH

vs.

DAVID LYDON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, David Lydon, appeals from an order denying his motion for jail credit. The defendant argues that the judge erred in failing to exercise discretion to credit the defendant for the time he served on an unrelated sentence while he was awaiting his sentencing on charges in Suffolk Superior Court (Suffolk). We affirm.

On August 28, 2014, the defendant was arrested for two unarmed robberies, in violation of G. L. c. 265, § 19(b).[1] At the time of his arrest, the defendant was on probation for prior convictions involving drug charges in the Roxbury Division of the Boston Municipal Court (Roxbury). On August 29, 2014, the

[1] The defendant was also charged with assault and battery on a person sixty years or older or assault and battery on a person with a disability, in violation of G. L. c. 265, § 13K (a1/2), that allegedly resulted from the commission of one of the robberies.

defendant was arraigned for the charges relating to the robberies in the Dorchester Division of the Boston Municipal Court (Dorchester).[2] On October 3, 2014, the defendant stipulated to a violation of probation in Roxbury and was sentenced to six months in a house of correction. He was moved from the Suffolk County jail to the Suffolk County house of correction.

On October 30, 2014, the defendant was arraigned in the Suffolk case, where bail was set. The defendant was held in lieu of bail, and on February 12, 2015, the defendant pleaded guilty to all three charges in the Suffolk case. He was sentenced to two and one-half to three and one-half years of incarceration in State prison on the two unarmed robbery indictments, concurrent with each other and imposed forthwith. The Suffolk County house of correction sentence, imposed at Roxbury, was effectively terminated as of that date.[3]

At sentencing, the defendant requested that the judge credit the time that he had spent in custody, beginning from his arrest in Dorchester. The sentencing judge credited the defendant with thirty-six days, the time between his arrest on

---

[2] Because the defendant could not post bail, he was held in custody and remained in custody until his sentencing in Roxbury for violating probation.

[3] For the assault and battery charge on a person sixty years or older, the defendant received a sentence of three years of probation, with several conditions, from and after the State prison sentence.

August 28, and the Roxbury sentencing, on October 3. The judge stated that he could not "give him credit" for the time (approximately 132 days) between the Roxbury sentencing and the sentencing in the Suffolk case.

The defendant filed a motion for jail credit claiming that he was entitled to additional credit (the time that he spent serving his sentence pursuant to the violation of probation until the time of the Suffolk sentencing) as a matter of judicial discretion pursuant to Commonwealth v. Ridge, 470 Mass. 1024, 1025 (2015). The judge denied the motion on the basis that Ridge did not apply to the circumstances of the defendant's case.

Discussion. The defendant argues that the sentencing judge erroneously believed that he lacked authority to grant the defendant credit for the time that the defendant was held in lieu of bail, while also serving a sentence on another case. The defendant's reliance on Ridge, however, is misguided.

In Ridge, the defendant was sentenced in Norfolk County to approximately four years in State prison. Ibid. At the time of this sentencing, he received credit for the time that he was held on bail and awaiting trial on both the Norfolk charges and other charges pending against him in Plymouth County. Ibid. One year later, the defendant was sentenced on charges in Plymouth County, where the sentencing judge ordered him to serve

a term of fourteen to fifteen years in the State prison. Ibid. The defendant argued on appeal that he should receive credit on his Plymouth County sentencing for the time that he was detained awaiting trial. Ibid. The Supreme Judicial Court held that the motion judge was not obligated to grant the defendant's request because the defendant did not seek credit at the time of the Plymouth County sentencing. Id. at 1024-1025. However, the court stated that "had the defendant requested credit for his pretrial detention at the time of the Plymouth County sentencing, the sentencing judge plainly would have had the power to accede to or to deny the request." Id. at 1025.

The defendant contends that this statement made in Ridge, stands for the proposition that it is within the sentencing judge's discretion to credit the time that a defendant spends in custody while serving a sentence for an unrelated offense. To the contrary, the court in Ridge used the term "pretrial detention" in reference to the defendant's specific request before the court: to receive credit for the time that the defendant spent in pretrial custody before both the Norfolk County sentence and the Plymouth County sentence.[4] See id. at 1024 (time spent in pretrial custody was "credited to his

[4] In fact, the defendant in Ridge specifically stated in his appellate brief that he "is not requesting [on appeal] double credit or credit for the time between when he was sentenced in Norfolk to the time he was sentenced in Plymouth."

Norfolk County sentence"). Moreover, here, the defendant received the credit that the defendant in Ridge had requested on appeal, the full thirty-six days that he was held on bail and awaiting sentencing in both Roxbury and Suffolk.

There is no question that a defendant "is entitled to credit for time spent confined to jail before sentencing so long as that confinement is related to the criminal episode for which the prisoner is then sentenced" (emphasis supplied). Commonwealth v. Barton, 74 Mass. App. Ct. 912, 913 (2009). Here, however, it was proper for the sentencing judge to find that it was not within his discretion to credit the defendant's Superior Court sentence for the time that he was incarcerated and serving an unrelated sentence. See Ledbetter v. Commonwealth, 456 Mass. 1007, 1009 (2010) ("[The defendant] is not, as he claims, entitled to credit against his Superior Court drug sentences for the time he was incarcerated on an unrelated . . . sentence"); Barton, 74 Mass. App. Ct. at 913 ("The statutory purpose [of the jail credit statutes] was not to allow deductions for time served under sentence for another crime, but was to afford relief to those not convicted and not serving any sentence but who because of inability to obtain bail, for example, were held in custody awaiting trial" [quoting from Needel, petitioner, 344 Mass. 262, 262 (1962)]). While "[i]n some circumstances, a defendant may be allowed to credit time in

an unrelated case if necessary to prevent a defendant from serving 'dead time,'" such circumstances are not present here. Williams v. Superintendent, Mass. Treatment Ctr., 463 Mass. 627, 632 (2012), quoting from Commonwealth v. Milton, 427 Mass. 18, 24 (1998). See Commonwealth v. Blaikie, 21 Mass. App. Ct. 956, 957 (1986) ("We perceive no special consideration of fairness which requires crediting the Suffolk sentences with time spent in confinement awaiting sentence on the unrelated Middlesex offenses"). We therefore find no error.

Order denying motion for jail credit affirmed.

By the Court (Kafker, C.J., Trainor & Henry, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: December 2, 2016.

[5] The panelists are listed in order of seniority.

The Commonwealth of Massachusetts
Committee for Public Counsel Services
Public Defender Division
One Congress Street, Suite 102
Boston, MA 02114

ANTHONY J. BENEDETTI
CHIEF COUNSEL

TEL: (617) 209-5500
FAX: (617) 523-0352

JOHN C. HAYES
ATTORNEY IN CHARGE
BOSTON SUPERIOR COURT TRIAL UNIT

December 22, 2016

The Honorable Scott L. Kafker
Chief Justice
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square, Room 1200
Boston, MA 02108

Re: Commonwealth v. David Lydon
No. 2015-P-0765

Dear Mr. Chief Justice:

I represent the defendant in the case noted above, which was decided on December 2, 2016, by a panel of this Court (Kafker, CJ., Trainor & Henry, JJ.). Pursuant to Mass. R.A.P. 27, the defendant petitions for rehearing.

In its 1:28 decision, the Court concluded that the sentencing judge lacked authority to give the defendant credit for time (roughly 132 days) after the defendant had also been sentenced in a probation matter in Roxbury. The Court distinguished a statement from Commonwealth v. Ridge, 470 Mass. 1024, 1025 (2015) ("To be sure, had the defendant requested credit for his pretrial detention at the time of the [second] sentencing, the sentencing judge plainly would have had the power to accede to or to deny the request.").

I write, pursuant to Mass. R.A.P. 27, to note that the decision in this case conflicts with another recent 1:28 decision issued by a different panel of this Court, and in fact with the position that the Commonwealth took in that case. See Commonwealth v. Sullivan, No. 2016-P-908, 90 Mass. App. Ct. 1114, 2016 Mass. App. Unpub. LEXIS 1064 (Nov. 4, 2016). In that decision, issued just last month, the Court (Agnes, Blake & Desmond, JJ.) approved and reinstated jail credit of exactly the sort Mr. Lydon sought in this case: time from the date of defendant's sentencing

on a probation matter to the date of the sentencing in the case at issue.

The decision in Sullivan is short because both parties agreed both that the credit could be given and that the sentencing judge had intended to do so. To flesh out the context, I have attached a copy of the brief of the Plymouth County District Attorney's Office.

In that case, the defendant was arraigned on new charges on July 3, 2007, triggering a probation-violation sentence on July 18, 2007, of ten to fifteen years in state prison. After nearly two years, the defendant then was convicted of the new charges and sentenced on June 8, 2009, to another sentence of ten to fifteen years in state prison, concurrent with the probation sentence and "with any and all time awaiting disposition to be deemed to have been served." The mittimus, however, did not include credit for the 691 days between the July 18, 2007, probation sentencing and the June 8, 2009, sentencing in the new case, and a different judge later denied the defendant's motion to correct the mittimus to add that credit.

In Sullivan, the Commonwealth argued (and, by implication, the Court adopted) the same interpretation of Ridge and Commonwealth v. Barton, 74 Mass. App. Ct. 912, 914 (2009), that the defendant advanced in this case. The argument is similar enough that it is worth excerpting at length:

> Although the defendant's sentence was not ordered nunc pro tunc, the orders of the sentencing judge essentially leave no other application of the sentence. See Commonwealth v. Barton, 74 Mass. App. Ct. 912 (2009) and Commonwealth v. Carter, 10 Mass. App. Ct. 618 (1980). In this case, where the judge ordered a concurrent sentence with the probation violation sentence as well as credit for all time served, it is apparent that the judge intended to either credit the defendant with the time served from his arraignment to the conviction date, order the concurrent sentence to run nunc pro tunc, or both. See Commonwealth v. Ridge, 470 Mass. 1024, 1025 (2015) (had the defendant requested credit for his pretrial detention at the time of sentencing, the sentencing judge plainly would have had the power to accede to or to deny the request).
>
> ...
>
> Accordingly, where the sentencing judge rejected a "from and after" sentence, and imposed a concurrent sentence with pre-trial credit, it is evident that she ordered a nunc pro tunc sentence, even where she did not expressly state those words.

Plymouth DAO Brief at 6-7.

The judge in this case should have been able to grant this same sort of credit, but erred in believing he did not have that authority. I therefore ask the Court to reconsider its decision in light of Sullivan (and the position of the Plymouth County District Attorney's Office in that case) and to vacate the denial of the defendant's motion for jail credit and remand for consideration under the proper understanding of the judge's authority.

I also wish to note one inaccuracy in the Court's decision in Mr. Lydon's case: the decision states at page 5 that, "here, the defendant received the credit that the defendant in Ridge had requested on appeal, the full thirty-six days that he was held on bail and awaiting sentencing in both Roxbury and Suffolk." In fact, Mr. Lydon was held only on the Suffolk bail (or more accurately, the Dorchester bail that preceded it) during this time. He was never held on a Roxbury bail, but rather waived his final surrender hearing and was sentenced in Roxbury on his first appearance back in that court, on October 3, 2014. See Commonwealth v. Lydon, Docket No. 1402CR000381 (Roxbury docket, attached). See Commonwealth v. Thurston, 53 Mass. App. Ct. 548, 554 (2002), citing Camara v. Board of Appeals, 40 Mass. App. Ct. 209, 211 (1996) (court may take judicial notice of court records). The 36 days' credit was therefore mandatory, not discretionary. The only discretionary time that was requested was the 132 days at issue in this appeal.

It is worth noting that Mr. Lydon could have insisted on a separate ("final") probation violation hearing date in Roxbury, 30 days after his first return there. Dist./Mun. Cts. R. Prob. Viol. Proc. 3(b)(iii). Had he done so, and all other things being equal, he could be entitled to release 30 days earlier than he is now under this Court's ruling, because the time from October 3 to November 2, 2014, could have been credited to his Suffolk Superior Court sentence.

Thank you for your thoughtful consideration of this case.

Sincerely,

Jeff Garland
Attorney for Mr. Lydon

cc: ADA Helle Sachse

Copy of Paper #10

Judge's Copy

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DOCKET NO. SUCR 2014-10920

COMMONWEALTH

v.

DAVID LYDON

MOTION FOR JAIL CREDIT
AND MEMORANDUM IN SUPPORT

Now comes the defendant, David Lydon, and respectfully requests the Honorable Court to grant 132 days' additional jail credit for the time when he was held on bail on this case and also serving a sentence out of Roxbury court. As grounds therefore:

(a) A recent decision of the Supreme Judicial Court states that such credit is available, in the court's discretion, in circumstances such as these. Commonwealth v. Ridge, 470 Mass. 1024, 1025 (March 2, 2015).

(b) The Court should exercise its discretion to grant Mr. Lydon this jail credit because the probation violations in Roxbury were based on his conduct in this case; because the bail on this case affected his incarceration on the Roxbury case, interfering with his eligibility for parole and for various programs; and because he is due for three years of probation after completion of incarceration in this case.

4/23/15 Upon review, motion denied. The defendant is not entitled to credit for time being served on sentences in other cases. Comm. v. Ridge, 470 Mass 1024 (2015) does not apply to the circumstances of the present case.

A. FACTS

Mr. Lydon was arrested on October 28, 2014, and arraigned in Dorchester on October 29. He was given a total bail of $40,000, and continued to be held on that bail through his arraignment in this Court on October 30, 2014, to the sentencing date of February 12, 2015 (with sentence actually imposed on February 13).

On October 3, Mr. Lydon stipulated to a violation of probation in three Roxbury cases, dockets number 1402 CR 0381, 1983, and 2061. The violation was based on Mr. Lydon's arrest in this current case. On those Roxbury cases, all of which involved possession or distribution of Class E substances, Mr. Lydon received sentences of six months in the House of Correction on two charges, and ninety days on a third, to run concurrently. Mr. Lydon was then sent to the Suffolk County House of Correction on October 3, though he continued to have a $40,000 bail on this case.

At the lobby conference for this case on January 20, 2015, and later at the sentencing on February 12, defense counsel requested that the Court award credit for all the time Mr. Lydon was held on a bail in this case: 168 days. While acknowledging that this credit was not legally required, counsel suggested it would be appropriate in this case. The Court stated that it could not do so because Mr. Lydon had been serving a sentence on Roxbury cases during some of that time. Instead, the Court allowed Mr. Lydon 36 days' credit, for the time that Mr. Lydon was held on this case but not yet sentenced on those Roxbury cases. The Court sentenced Mr. Lydon to two-and-a-half to three-and-a-half years in State Prison on counts one and two, to run concurrently, with 36 days' credit, to begin forthwith. The Court also imposed three years of probation on count three from and after the State Prison sentence.

B. THE COURT HAS AUTHORITY TO GIVE THIS CREDIT

At the time of sentencing, there was no case law directly addressing this scenario one way or another. The closest authority counsel had been able to find was dictum in in Commonwealth v. Barton, 74 Mass. App. Ct. 912, 914 (2009), indicating the possibility of "multiple concurrent sentences for several different offenses that arise from several different criminal episodes, perhaps in different counties, but with circumstances being viewed by the later sentencing judge as warranting an order for the later-imposed sentence to begin on the same date as the first, nunc pro tunc."

On March 2, 2015, the Supreme Judicial Court issued a *per curiam* opinion in Commonwealth v. Ridge, 470 Mass. 1024, clearly indicating that such credit could be available. In Ridge, the defendant was sentenced to roughly four years in State Prison in Norfolk County in 2007, receiving credit for the time when he had been held in custody on both that case and another case pending in Plymouth County. In 2008, he pleaded to the Plymouth County case and was sentenced to 14-15 years in State Prison, but "neither requested nor received credit for his pretrial detention." Id. at 1024. Later, he did request the credit, and the judge denied it. The Supreme Judicial Court held that "the motion judge was not obligated to grant his request" for additional credit, especially considering that he did not request the credit until nearly five years alterwards. Id. at 1025.

Importantly, though, for this case, the Court stated that "[t]o be sure, had the defendant requested credit for his pretrial detention at the time of the [second] sentencing, the sentencing judge plainly would have had the power to accede to or deny the request." Id.

In Mr. Lydon's case, defense counsel previously made, and now repeats, such a request for credit for pretrial detention. Ridge clarifies the authority of this Court to "accede to . . . the request." Id.

C. THE COURT SHOULD GIVE THE CREDIT IN THIS CASE

Mr. Lydon's case presents a good case for giving jail credit for several reasons:

First, Mr. Lydon's Roxbury sentences were imposed primarily because the conduct underlying the current case was a violation of his probation. The three cases in Roxbury were not in themselves very serious, dealing only with the possession and distribution of Class E substances.

Second, the pendency of this case affected the sentence Mr. Lydon served at the South Bay House of Correction. While at South Bay House, Mr. Lydon was ineligible for parole, and also ineligible for certain work programs, because of this case. If this current case had not existed, and had Mr. Lydon violated probation for unrelated reasons and received the same sentences, he would have been eligible for parole after ninety days – half the time of the sentence, see 120 C.M.R. 200.2, 200.4. Instead, he served 132 days on his Roxbury cases until the sentence in this case was imposed forthwith. And, had Mr. Lydon served his Roxbury sentences without the bail imposed on this case, he could have been eligible for certain work and work release programs that were unavailable to him due to the pending case. See G.L. c. 127, §§ 86F, 86H.

Third, and finally, Mr. Lydon has three years of probation to follow his committed sentences in this case. Giving him the requested jail credit will slightly reduce his period of incarceration, but he will remain obligated to the Court for those three years following release.

Respectfully Submitted,
DAVID LYDON,
By Counsel,

Jeffrey A. Garland, BBO # 679100
Committee for Public Counsel Services
Public Defender Division
One Congress Street, Suite 102
Boston, MA 02114
(617) 209-5500

Dated: March 27, 2015

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
DOCKET NO. SUCR 2014-10920

COMMONWEALTH

v.

DAVID LYDON

AFFIDAVIT IN SUPPORT OF MOTION FOR JAIL CREDIT

I, Jeffrey A. Garland, state the following is true to the best of my information and knowledge:

1. I am an attorney with the Committee for Public Counsel Services, and I represent David Lydon in this case.
2. Mr. Lydon was arrested on August 28, 2014, and arraigned in Dorchester on August 29, where he was given a total bail of $40,000 and was then sent to the Nashua Street Jail.
3. On October 3, 2014, Mr. Lydon stipulated to a probation violation, primarily based on the conduct underlying this case, in Roxbury cases involving possession and distribution of Class E substances, docket numbers 1402CR0381, 1402CR1983, and 1402CR2061. He was sentenced to a total of 6 months in the House of Correction in sentences that were concurrent with one another.
4. On that date he was sent to the Suffolk County House of Correction at South Bay, though he continued also to have a bail on this case.

5. Due to the pending case and bail, he was not eligible for parole while at South Bay, nor eligible for the work programs normally available to sentenced inmates.
6. On January 20, 2015, the Court held a lobby conference, and on February 12, Mr. Lydon pleaded guilty in the indictments in this case, receiving a sentence of two-and-a-half to three-and-a-half years in State Prison on counts one and two, to run concurrently, and three years of probation on count three from and after the State Prison sentence, with conditions that he remain drug and alcohol free, with testing, receive drug and alcohol evaluation and treatment, and stay away from the named victims and banks. The sentence was imposed on February 13, 2015.
7. Defense counsel requested credit for the full time Mr. Lydon had a bail on this case in Dorchester and Superior Court. The Court gave credit for 36 days before Mr. Lydon was sentenced in Roxbury, but indicated it could not give further credit.

Signed on this 26th of March, 2015, under penalties of perjury.

Jeffrey A. Garland

COMMONWEALTH *vs.* MARK SULLIVAN.

16-P-908

APPEALS COURT OF MASSACHUSETTS

90 Mass. App. Ct. 1114*; *2016 Mass. App. Unpub. LEXIS 1064

November 4, 2016, Entered

JUDGES: Agnes, Blake & Desmond, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Mark Sullivan, appeals from the order denying his motion to correct the mittimus. He contends that the mittimus failed to credit him for 691 days he served while awaiting trial. At the time of sentencing, the trial judge noted on the record that "the court orders any and all time awaiting disposition to be deemed to have been served." The trial judge having retired, a different judge denied the defendant's motion to correct the mittimus to provide credit for the 691 days served. The Commonwealth commendably concedes that the intent of the trial judge was to give the defendant the credit that he is seeking. *Commonwealth v. Bruzzese, 437 Mass. 606, 613-614, 773 N.E.2d 921(2002)*. We agree. Accordingly, the order denying the motion to correct the mittimus is vacated and a new order shall enter allowing the motion.

So ordered.

By the Court (Agnes, Blake & Desmond, JJ.[1]),

1 The panelists are listed in order of seniority.

Entered: November 4, 2016.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT NO.
2016-P-0908

COMMONWEALTH,
Appellant

VS.

MARK SULLIVAN,
Appellee

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

TIMOTHY J. CRUZ
District Attorney
Plymouth District
JESSICA HEATON
Assistant District Attorney
BBO # 656889
32 Belmont Street
Brockton, MA 02301
(508) 584-8120
jessica.heaton@massmail.state.ma.us

October 3, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

I. Where the sentencing judge ordered a concurrent sentence and "any and all time awaiting disposition to be deemed to have been served" and the defendant has already been credited with the time period preceding his probation revocation hearing, is the defendant entitled to credit for the two years from his probation revocation?

STATEMENT OF THE CASE

On June 1, 2007, the defendant was indicted for possessing visual material of a child depicted in sexual conduct, in violation of G.L. c. 272, § 29C. He was indicted on a second count of violating the same statute as a subsequent offense. (RA. 11-13)[1]. Following a jury trial, the defendant was convicted of one count of possession of child pornography. (RA. 7). He was also convicted on the subsequent offense charge. (RA. 8).

On July 3, 2007, the defendant was arraigned and held on $5,000 cash bail. (RA. 3). He was already being held on a probation violation. When the defendant was charged, he was serving a term of

---

[1] Citations to the defendant's Record Appendix will be referenced as (RA. __).

probation for other multiple convictions of possession of child pornography and posing a child in the nude. (RA. 19-20).

In light of the pending charges in this case, the defendant was arrested on February 16, 2007 for violating his probation, and then sentenced on July 18, 2007 to 10-15 years in prison by Judge Locke. (RA. 20-21). The mittimus for this sentence did not reflect the 152 days, from the date of his arrest in February 2007 until his sentencing on the probation violation in July 2007, that the defendant served while awaiting disposition. (RA. 9, 24-25). In 2013, the trial court gave the defendant 152 days of credit for the detention prior to the probation revocation hearing. (RA. 9, 27).

On June 8, 2009, the defendant received a consolidated judgment on both counts and was sentenced to 10-15 years at MCI Cedar Junction, to run concurrent with the sentence he was already serving after the probation revocation. (RA. 8). At sentencing, the clerk stated, "The court further orders that this sentence is to be served concurrently with the sentence you are presently serving at said institution." (RA. 67). Neither the clerk nor the

judge ordered the concurrent sentence to run "nunc pro tunc." However, the clerk continued, "The court orders any and all time awaiting disposition to be deemed to have been served." (RA. 67).

On June 2, 2016, the defendant filed a Motion to Correct the Mittimus so that the mittimus reflected pre-trial confinement credit for the time period of July 18, 2007 through June 8, 2009. (RA. 9, 77-79). On June 13, 2016, the motion was denied without a hearing by a judge other than the trial judge. (RA. 9, 79). The defendant now appeals the denial of his Motion to Correct the Mittimus.

STATEMENT OF THE FACTS

The underlying facts are excerpted from the defendant's prior appeal:

> A librarian, checking on a computer in an isolated alcove of the library, found the defendant printing out a photograph of a naked girl on a beach. The librarian told the defendant this was not what the computers were to be used for, and he tried to take the photograph away from the defendant. The defendant ripped the photograph away, leaving the librarian with only a small piece of it. As another picture started to print, the librarian turned the printer off and told the defendant that he could lose his library privileges. The librarian then contacted his supervisor, who came to speak to the defendant. The defendant informed the supervisor that the "images were heavily censored," to which the

supervisor responded that it was irrelevant. The defendant then stated, "I couldn't help it. It was a pop-up." The librarian then inquired, if that were so, why it printed. The defendant had no response. When asked his name, the defendant said, "Smith."

After the library closed, the librarian reviewed the computer's Web site history and found the photograph the defendant had printed, as well as others of children on beaches and in other settings, with and without clothes. He determined the printed photograph came from a Russian-based Web site called "Photofile.RU."

The grand jury were informed that the librarian also saw that the defendant had reviewed sex offender sites and that one of the names that the defendant had checked on the site was Mark Sullivan. The librarian "ran" a search for that name and found it to be the name of a level three sex offender from Norwell. The librarian retrieved a photograph of Mark Sullivan on the sex offender registry Web site and identified it as a photograph of the library patron who had printed out the photograph the librarian had seen. The librarian contacted the police.

Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, 295, rev. denied, 463 Mass. 1112 (2012).

ARGUMENT

I. WHERE THE SENTENCING JUDGE ORDERED A CONCURRENT SENTENCE AND "ANY AND ALL TIME AWAITING DISPOSITION TO BE DEEMED TO HAVE BEEN SERVED" AND THE DEFENDANT HAS ALREADY BEEN CREDITED WITH THE TIME PERIOD PRECEDING HIS PROBATION REVOCATION HEARING, THE COMMONWEALTH IS CONSTRAINED TO CONCEDE THAT THE DEFENDANT IS ENTITLED TO THE ADDITIONAL 691 DAYS OF SENTENCING CREDIT.

With all due respect to this Court in its authority to determine whether reversal is required, the Commonwealth is constrained to concede that reversal of the denial of the motion to correct the mittimus for sentencing credits is required based on the binding case law. See Commonwealth v. Santos, 65 Mass. App. Ct. 122, 124 (2005) (Commonwealth's concession remains subject to review of appellate court); Commonwealth v. Pittman, 60 Mass. App. Ct. 161, 170 (2003), rev. denied, 441 Mass. 1104 (2004) (appellate court accepted concession).

At the time the defendant was arraigned and bail was set in this case, he was already being held on a probation violation. As noted above, the Superior Court has already been credited with that time towards his probation violation sentence. The defendant now asks this Court for credit for the time period of July 18, 2007, the date at which he was sentenced on the probation violation, through June 8, 2009, the date he was sentenced in this case.

Although the defendant's sentence was not ordered nunc pro tunc, the orders of the sentencing judge essentially leave no other application of the sentence. See Commonwealth v. Barton, 74 Mass. App.

Ct. 912 (2009) and Commonwealth v. Carter, 10 Mass. App. Ct. 618 (1980). In this case, where the judge ordered a concurrent sentence with the probation violation sentence as well as credit for all time served, it is apparent that the judge intended to either credit the defendant with the time served from his arraignment to the conviction date, order the concurrent sentence to run nunc pro tunc, or both. See Commonwealth v. Ridge, 470 Mass. 1024, 1025 (2015) (had the defendant requested credit for his pretrial detention at the time of sentencing, the sentencing judge plainly would have had the power to accede to or to deny the request). In doing so, the judge expressly declined to adopt the Commonwealth's recommendation of a "from and after" sentence. (RA. 58).

Furthermore, if the defendant had not been sentenced to jail on the probation violation, he would have been held in pre-trial custody on the $5,000 cash bail that was ordered at arraignment. In that scenario, he would have been entitled to that sentencing credit upon conviction for the underlying case.

Accordingly, where the sentencing judge rejected a "from and after" sentence, and imposed a concurrent sentence with pre-trial credit, it is evident that she ordered a nunc pro tunc sentence, even where she did not expressly state those words.

Given the resolution of this issue, the Commonwealth's brief does not address the second issue raised by the defendant in his brief. However, it is the circumstances limited to this case, specifically the orders of the sentencing judge at sentencing and that the Commonwealth did not appeal the 152 days of credit previously ordered by the Superior Court, in which the Commonwealth agrees that the credit should be ordered.

CONCLUSION

For the above stated reasons, the Commonwealth respectfully requests that this Court vacate the denial of the motion to correct the mittimus and order that the mittimus reflect the additional 691 days of credit as intended by the sentencing judge.

Respectfully submitted,

By: Jessica Heaton

Jessica Heaton
Assistant District Attorney
For the Plymouth District
BBO # 656889

October 3, 2016